

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY D. WHITE,	§	
	§	No. 343, 2009
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. No. 0603015418A
Appellee.	§	

Submitted: February 12, 2010

Decided: May 4, 2010

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

**ORDER**

This 4<sup>th</sup> day of May 2010, it appears to the Court that:

(1) Anthony D. White has appealed the Superior Court’s denial of his motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). After careful consideration of the parties’ briefs on appeal and the Superior Court record, the Court has concluded that the denial of postconviction relief should be affirmed.

(2) On March 15, 2006, at Lombard and Taylor Streets in Wilmington, Delaware, thirteen-year old Jaywann Tucker robbed fourteen-year old Qy-Mere Maddrey at gunpoint. Witnessing the robbery were Tucker’s friend, Ahmand Phoenix and Maddrey’s friend, Jeree Richardson.

(3) After he was robbed, Maddrey called the appellant, Anthony White, and told him what Tucker had done. White, age twenty-five, is Maddrey's sister's boyfriend.

(4) Twenty minutes after Maddrey called White, Tucker was shot several times in the vicinity of Walnut Street adjacent to the Compton Apartments. A surveillance video camera mounted to an exterior wall of the apartment building recorded the events, *i.e.*, that an individual dressed in black pulled out a gun, aimed it at Tucker and chased him into a nearby alley.

(5) White and Maddrey were charged with Tucker's shooting. White was charged with Attempted Murder in the First Degree, Possession of a Deadly Weapon During the Commission of a Felony, and Conspiracy in the Second Degree. Maddrey, a juvenile, was similarly charged but pled guilty to first degree assault in exchange for his agreement to testify at White's trial.

(6) At the conclusion of the three-day trial, the jury convicted White of attempted murder and the weapon offense and acquitted him of conspiracy. The Superior Court sentenced White to a total of twenty-nine years at Level V suspended after eighteen years mandatory for five years at Level IV suspended after six months for decreasing levels of supervision.

(7) At trial, the prosecutor played the surveillance camera videotape for the jury. The prosecutor also introduced five gun casings retrieved from the area

and a police evidence technician's testimony that the casings came from the same gun.

(8) Wilmington Police Detective Tom Curley was the chief investigating officer assigned to the case. Detective Curley testified at White's trial as did Tucker, Phoenix and Maddrey.

(9) The record reflects that the trial testimony of Tucker, Phoenix and Maddrey contradicted prior statements that each had given to Detective Curley. At trial, both Tucker and Maddrey testified that they witnessed White shooting at Tucker. In prior statements to Curley, however, Tucker told Curley that he didn't know who shot him and Maddrey told Curley that he – Maddrey – shot Tucker. Phoenix, on the other hand, after telling Curley in a prior statement that he saw White shooting at Tucker, testified at trial that he did not witness the shooting and had no knowledge of it whatsoever.

(10) Not surprisingly, White's defense strategy focused on attacking the credibility of Tucker, Maddrey and Phoenix. White's trial counsel also argued that the videotape from the surveillance camera did not clearly depict the person who aimed the gun at Tucker or that the person fired the gun. White's counsel also argued that the State did not prove that Tucker's bullet wounds came from that gun.

(11) On the second day of trial, several jury members indicated to the trial judge that they had discussed the case during a brief recess. With the agreement of White's trial counsel and the prosecutor, the judge spoke to the jury in private "to find out what it is [they] discussed . . . and to see if it's problematic in terms of continuing . . . the case."<sup>1</sup> Afterward the judge stated:

I did speak to the jury. It's on the record. They – I don't believe we have any problem in continuing with the trial. They were confused by all the different names, the street names and nicknames, and expressed their confusion to one another, and so they had a discussion about who the cast of characters is, and that was predominantly what we were talking about. They did ask that the lawyers make it [clearer] and try to refer to individuals by one name, one name only, so as to avoid confusion. I asked them a couple of different ways whether they felt they were still able to adhere to their oath and be fair and impartial and continue, and base their decisions only on the evidence and they said yes. They seemed very conscientious. I asked on two or three separate occasions whether anybody, during the course of the discussion about who was who, expressed an opinion as to the truth or falsity or credibility or incredibility of any witnesses or testimony, and they uniformly said no. So, I am convinced that we don't have a problem. I have strongly talked to them about the necessity of not discussing any aspect of the case from here on out. I thought I made that clear, but I understand they were frustrated and were just talking to each other about who was who. You're welcome to look at the real time transcript during a recess.<sup>2</sup>

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<sup>1</sup> Trial tr. at 33 (Mar. 8, 2007).

<sup>2</sup> *Id.* at 37, 38.

(12) On direct appeal, White raised one claim, *i.e.*, that the trial judge erred in refusing to give the jury a self-defense instruction. Finding no merit to that argument, this Court affirmed the Superior Court judgment.<sup>3</sup>

(13) In January 2009, White filed a motion for postconviction relief and supporting memorandum. White alleged numerous and overlapping claims of ineffective assistance of counsel, prosecutorial misconduct and errors made by the trial judge.

(14) White alleged that his trial counsel, among other things, failed to request a “special accomplice liability instruction,” to object to the trial judge’s private discussion with the jury, to move for a mistrial and to have certain witnesses’ trial testimony stricken from the record. White alleged that the prosecutor withheld exculpatory evidence, made inappropriate comments during closing argument, and asked leading questions of the State’s witnesses. White alleged that the trial judge failed to give a “special accomplice liability instruction,” failed to control the misconduct of the prosecutor, and conducted a “covert” *voir dire* of the jury.

(15) The Superior Court assigned White’s postconviction motion to a commissioner for proposed findings and recommendations. In accordance with the

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<sup>3</sup> *White v. State*, 2008 WL 4107980 (Del. Supr.).

commissioner's brief schedule, White's trial counsel filed an affidavit, the State filed a response, and White filed a reply.

(16) By report dated May 1, 2009, the commissioner recommended that White's postconviction motion should be denied. The commissioner found that White's claims were without merit and/or were procedurally barred.<sup>4</sup> By order dated May 15, 2009, the Superior Court adopted the commissioner's May 1, 2009 report and recommendation and denied White's motion for postconviction relief.

(17) On May 28, 2009, White filed a "request for reconsideration" of the commissioner's May 1 report and recommendation. White argued that the commissioner's factual findings and legal conclusions were flawed, and that the commissioner had violated due process.

(18) On June 15, 2009, White filed an appeal from the Superior Court's May 15, 2009 denial of his motion for postconviction relief. Thereafter, by order dated July 1, 2009, the Superior Court denied White's "request for reconsideration" after determining that the request was untimely filed, and that White's contentions were conclusory and/or moot. Also, on August 3, 2009, the Superior Court issued an "amended order" that made a clerical correction to the

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<sup>4</sup> See Del. Super. Crim. R. 61(i) (listing procedural bars to relief).

first sentence of the May 15, 2009 order denying White's motion for postconviction relief.<sup>5</sup>

(19) White argues that the August 3 amendment to the May 15 order suggests that the Superior Court judge “and possibly the commissioner [had] confused him with another Anthony White,” and that both the commissioner and the judge were “unfocused” when issuing their respective decisions in May 2009. Having reviewed the record, however, we do not agree with White's assertions. Nor do we agree with White's assertions that the commissioner's report was “obviously incomplete, inconclusive, bias[ed], and displayed a showing of hostility.”

(20) In a similar vein, White argues that the commissioner could not have given sufficient consideration to White's reply that was filed on April 29, 2009, two days prior to the commissioner's May 1 report and recommendation. White also argues that he was prejudiced by the commissioner's briefing schedule that gave White only twenty days to file his reply.<sup>6</sup> The record does not support White's claims.

(21) White argues that he was prejudiced when Maddrey's friend Richardson was not compelled to testify at trial. According to White, Richardson

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<sup>5</sup> The “amended order” replaced the words “Count II of Defendant's Second Motion” with the words “Defendant's Motion.”

<sup>6</sup> See Del. Super. Cr. Crim. R. 61(f)(3) (providing that a movant may file a reply to the state's response within 30 days).

would have testified that Maddrey shot Tucker. Because White did not raise this claim in his postconviction motion, we review the claim for plain error, *i.e.*, error that is apparent from the face of the record.<sup>7</sup>

(22) The record offers no support for White’s claim that Richardson would have testified that Maddrey shot Tucker.<sup>8</sup> Moreover, even if Richardson had testified that it was Maddrey who shot Tucker, White has not demonstrated that the result of the trial would have been different.<sup>9</sup>

(23) To the extent White alleges that he was deprived of a “special accomplice liability jury instruction,” his claim is without merit. The record reflects that White was prosecuted as a principal, not an accomplice, and that the jury was instructed accordingly.<sup>10</sup> To the extent White alleges that he was deprived of a jury instruction on the credibility of Maddrey’s accomplice testimony, White’s claim is belied by the record.<sup>11</sup>

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<sup>7</sup> *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

<sup>8</sup> For one thing, the record does not reflect that Richardson witnessed the shooting.

<sup>9</sup> See *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (providing that “[u]nder the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”).

<sup>10</sup> The jury was instructed that to convict White of first degree attempted murder it had to find beyond a reasonable doubt that White intentionally attempted to cause the death of Tucker. Trial tr. at 6, 7 (Mar. 9, 2007). See *Allison v. State*, 2008 WL 308230 (Del. Supr.) (holding that jury was properly instructed where State did not proceed on a theory of accomplice liability).

<sup>11</sup> See *Smith v. State*, \_\_\_A.2d\_\_\_, 2010 WL 1224887 (Del. Supr.) (holding that trial counsel rendered ineffective assistance in failing to request a specific instruction on credibility of accomplice testimony).



(24) Finally, we agree with the Superior Court that White's allegations of ineffective assistance of counsel are largely conclusory and thus legally insufficient to establish that his counsel's performance fell below an objective standard of reasonableness and was prejudicial.<sup>12</sup> We also agree that White's claims of prosecutorial misconduct and trial judge error are procedurally defaulted under Rule 61(i)(3)<sup>13</sup> without exception.<sup>14</sup> The latter claims could have been raised on direct appeal but were not, and the record reveals no cause for relief from the procedural default, no prejudice,<sup>15</sup> and no indication of a miscarriage of justice because of a constitutional violation.<sup>16</sup>

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>12</sup> *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

<sup>13</sup> See Del. Super. Ct. Crim. R. 61(i)(3) (barring any ground for relief that was not previously raised).

<sup>14</sup> See Del. Super. Ct. Crim. R. 61(i)(5) (providing exception to (i)(3) bar).

<sup>15</sup> Del. Super. Ct. Crim. R. 61(i)(3).

<sup>16</sup> Del. Super. Ct. Crim. R. 61(i)(5).